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**IN THE
COURT OF APPEALS OF INDIANA**

STATE OF INDIANA,)	
)	
Appellant-Respondent,)	
)	
vs.)	No. 02A03-0511-PC-564
)	
TERRY P. HYSER,)	
)	
Appellee-Petitioner.)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
The Honorable Robert J. Schmoll, Magistrate
Cause No. 02D04-0110-CF-494

September 14, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

The State of Indiana appeals the post-conviction court's determination that Terry P. Hyser was denied the effective assistance of his trial counsel when, at Hyser's sentencing hearing, his attorney remained silent and allowed sentencing to proceed without offering any evidence of mitigating circumstances. Hyser cross-appeals, arguing that the post-conviction court erred when it denied relief based on Hyser's claims that his attorney was ineffective because of his alleged failure to adequately prepare for trial and because of the acrimonious relationship between Hyser and his attorney. We find on all counts that Hyser failed to demonstrate that he suffered any prejudice as a result of the alleged ineffective assistance of his counsel, and so, pursuant to *Strickland v. Washington*, all of his post-conviction claims must fail. We therefore reverse the post-conviction court's grant of relief regarding the sentencing phase of Hyser's trial, and we affirm its denial of relief regarding the guilt phase.

Facts and Procedural History

The facts of Hyser's underlying offense, as presented by this Court in its memorandum decision affirming the conviction on direct appeal, are as follows:

In the early morning hours of October 26, 2001, Robert Lewman stood on the patio of his home drinking coffee. He saw a van drive slowly down the street beside his house, turn around, and drive slowly back the other way. The van pulled off the road beside a locked storage shed. A passenger exited the van and went over to the secured door of the shed. He returned to the van, retrieved a tool, and broke the door latch. The man began removing items from the storage shed and placing them on the ground beside the van. Lewman then watched as another person, obscured from his view, placed the items in the van. Lewman called the police, and the van drove away. Officers responding to the call stopped a van driven by Hyser one to one-and-one-half blocks away. Lewman was taken to the scene and identified the passenger as the man he saw. The shed's owner

was also brought to the scene and identified items in the van as his property.

Hyser v. State, 779 N.E.2d 982, No. 02A05-0207-CR-304 (Ind. Ct. App. Nov. 26, 2002).

Hyser was subsequently charged with class C felony burglary,¹ and a jury trial was held on April 16, 2002. In the courtroom just before the start of the trial, the judge asked if there were any preliminary matters to be addressed. Public defender Jeffrey Raff, Hyser's attorney, indicated that Hyser had threatened him with physical violence, and the court bailiff, who had overheard the threat, confirmed this. Raff informed the court that he would be unable to continue his representation at trial unless Hyser was shackled or some other security measures could be taken to insure Raff's safety. When the trial judge questioned Hyser regarding his animosity toward counsel, Hyser began an agitated colloquy with the trial court where he detailed numerous perceived failures on the part of his counsel, including allegations that Raff never met with Hyser before trial, never discussed or researched this case before trial, refused to respond to any of Hyser's requests for communication, and refused to supply Hyser with any discovery materials for his personal review. Hyser indicated that he wished to hire a private attorney with his parents' financial resources, and he requested a continuance to do so.

Initially, the trial court seemed to grant Hyser's continuance, and the judge began questioning Hyser regarding his intent to hire an attorney and setting a deadline for Hyser's new attorney to enter an appearance with the court. The trial judge addressed both the prosecution and defense counsel about the continuance, however, and both indicated that they would prefer to proceed with the trial and that they believed that

¹ Ind. Code § 35-43-2-1.

Hyser would not secure private counsel. On further questioning, the trial court determined that Hyser had failed to secure counsel despite his reported intent to do so over the previous several months and that apparently Hyser did not actually have the support of his parents in obtaining private counsel. Further, Raff addressed Hyser's allegations that Raff had refused to communicate with him regarding the case and had prevented him from viewing discovery materials, and Raff assured the trial court that he had communicated adequately with his client, that he had provided Hyser with discovery materials, and that he was prepared to proceed with the trial. Raff indicated that Hyser was simply dissatisfied with Raff's representation because "I'm just not playing the game the way he wants me to play it." Appellant's App. p. 54 (Tr. of Jury Trial).² The trial judge then denied Hyser's request for a continuance, and Raff repeated his request that Hyser be secured in some manner. The trial judge ordered Hyser to be shackled and to be seated at the end of the defense table away from his attorney.

During voir dire, Raff asked prospective jurors questions related to their ability to serve, and he did not strike any of the potential jurors. After a jury was seated, both parties presented opening arguments, and the State presented its case. Raff cross-examined the State's witnesses and argued that only one man entered the building that was the subject of the burglary. After the jury was dismissed for lunch, the State requested that the trial court allow one of its witnesses, a police officer, to be released from subpoena. When asked if he had any objections, Raff stated "I want him out protecting my neighborhood from people like Mr. Hyser," to which the trial judge

² Although the transcript of the jury trial is included in the record before us, pages 19-26 are missing from that transcript. We therefore cite to the appendix when referencing those pages. The appendix indicates that the statement cited here corresponds to page 19 of the trial transcript.

responded “Uncalled for.” Tr. p. 103. In his closing argument, Raff conceded that the evidence of theft against his client was strong, but he argued that there was no evidence of burglary on Hyser’s part. The jury returned a verdict of guilty. In a brief discussion regarding sentencing, Raff asked Hyser to send him a letter detailing anything that may constitute mitigation in his case.

The trial court conducted a sentencing hearing on May 13, 2002. At the beginning of the hearing, the court asked Hyser if he was satisfied with the representation of his trial counsel. Hyser reiterated his complaints against Raff. Hyser was then presented with the pre-sentence investigation report prepared for the case, and the court took a recess to allow Hyser to review that report. After Hyser indicated a few minor errors in the report, the court moved forward with sentencing. Although present, Raff deferred to Hyser during the sentencing hearing and allowed Hyser to make his own argument. Hyser submitted the mitigation letter he had written to Raff, and the State argued that Hyser’s extensive criminal history was an aggravator.³ The trial court found Hyser’s criminal history to be an aggravator, found no mitigators, and Hyser received an enhanced sentence of eight years. Hyser’s conviction was affirmed on appeal.

Pursuant to Indiana Post-Conviction Rule 1, Hyser filed a petition for post-conviction relief. A post-conviction hearing was held on March 15, 2005, and Hyser offered as evidence the transcripts of both his jury trial and sentencing hearing. Hyser argued that he was denied his right to effective assistance of counsel based on the acrimonious relationship between he and public defender Raff, Raff’s failure to prepare

³ Hyser’s criminal record, dating to 1971, included eight juvenile adjudications, twenty misdemeanor convictions, and nine felony convictions.

for trial, and Raff's failure to present mitigating evidence at the sentencing hearing. The post-conviction court denied relief on Hyser's claims regarding his relationship with Raff and Raff's preparation for trial, but granted relief on Hyser's other claim, finding that Raff's representation at sentencing was ineffective. The State appeals that portion of the trial court's judgment in favor of Hyser, and Hyser cross-appeals that portion holding against him.

Discussion and Decision

Post-conviction procedures do not provide an opportunity for a "super-appeal"; rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based on grounds enumerated in the post-conviction rules. *Carew v. State*, 817 N.E.2d 281, 285 (Ind. Ct. App. 2004), *trans. denied*. "In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective assistance of counsel or issues demonstrably unavailable at the time of trial or direct appeal." *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002). Post-conviction proceedings are civil proceedings, so a defendant must establish his claims by a preponderance of the evidence. *Carew*, 817 N.E.2d at 285.

Indiana Post-Conviction Rule 1(7) authorizes an appeal to be taken by either the defendant or the State, and here we have both: the State appeals the post-conviction court's grant of relief regarding that portion of Hyser's claim involving the sentencing hearing, and Hyser cross-appeals the denial of relief regarding that portion of his claim involving his trial. Though both appeals are permitted under the Rule, the applicable

standard of review is not identical for both parties. *State v. Eubanks*, 729 N.E.2d 201, 204 (Ind. Ct. App. 2000).

When the State appeals a judgment granting post-conviction relief, our review is governed by Indiana Trial Rule 52(A), which provides that “the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” *See State v. Moore*, 678 N.E.2d 1258 (Ind. 1997), *cert. denied*, 523 U.S. 1079, 118 S. Ct. 1528, 140 L.Ed.2d 678 (1998). The “clearly erroneous” standard is a review for sufficiency of the evidence. *Eubanks*, 729 N.E.2d at 204. We reverse only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made. *Id.* “[C]lear error’ review requires the appellate court to assess whether there is any way the trial court could have reached its decision.” *Moore*, 678 N.E.2d at 1261 (quotation omitted). Under this standard, we defer substantially to findings of fact but not to conclusions of law. *Id.*

When a defendant appeals the denial of post-conviction relief, he appeals from a negative judgment because he had the burden of establishing grounds for relief at the post-conviction proceeding. *See State v. Clanton*, 443 N.E.2d 1204, 1205 (Ind. Ct. App. 1982); Ind. Post-Conviction Rule 1(5). On review of an appeal from a negative judgment, the appellate court “must be convinced that the evidence as a whole was such that it leads unerringly and unmistakably to a decision opposite that reached by the trial court.” *Eubanks*, 729 N.E.2d at 204-05. We will consider each party’s claim in turn, applying the applicable standards of review.

Hyser contends that his trial counsel was ineffective during both his trial and sentencing hearing. We review claims of ineffective assistance of trial counsel under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh’g denied*. *Carew*, 817 N.E.2d at 285-86. First, the petitioner must demonstrate that counsel’s performance was deficient because it fell below an objective standard of reasonableness and denied the petitioner the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002), *reh’g denied*.

Second, the petitioner must demonstrate that he was prejudiced by his counsel’s deficient performance. *Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002), *reh’g denied*. To demonstrate prejudice, a petitioner must demonstrate a reasonable probability that the result of the proceeding would have been different if his counsel had not made the errors. *Id.* A probability is reasonable if our confidence in the outcome has been undermined. *Id.* If we can easily dismiss an ineffective assistance claim based upon the prejudice prong, we may do so without addressing whether counsel’s performance was deficient. *Id.*

I. State’s Appeal: Ineffective Assistance of Counsel at Sentencing Hearing

The post-conviction court held that Hyser “has . . . shown that because his counsel failed to present any statements or arguments at sentencing that representation at sentencing was therefore ineffective.” Appellant’s App. p. 105 (Post-Conviction Judgment). On appeal, the State argues that the post-conviction court’s determination was clearly erroneous because no evidence was presented to satisfy the second prong of

the *Strickland* test, i.e., that Hyser was prejudiced by his counsel's allegedly deficient performance.

Hyser apparently argues that the trial court held as it did based on an assumption that where defense counsel remains silent at a sentencing hearing, this constitutes *per se* ineffective assistance. However, Hyser points to no case law supporting this assertion. The two cases he does cite involve federal habeas corpus claims, and in both of those cases the defendants presented substantial evidence to persuade the court that but for the ineffective assistance of their counsel, their trials would have resulted in different outcomes. *See Harris v. Dugger*, 874 F.2d 756 (11th Cir. 1989); *Osborn v. Schillinger*, 861 F.2d 612 (10th Cir. 1988). Hyser's post-conviction argument wholly lacks any such evidence.

Moreover, the State refers us to *State v. Miller*, 771 N.E.2d 1284, 1290-91 (Ind. Ct. App. 2002), where another panel of this Court held that even if an attorney's decision to remain silent at a sentencing hearing does constitute ineffective assistance of counsel, the defendant must still demonstrate resulting prejudice. Hyser contends that his attorney was ineffective because he failed to present mitigating evidence of Hyser's medical history that Hyser baldly asserts could have changed the outcome of his sentencing. Hyser has never indicated—to this Court or to any other tribunal—what this medical history consists of, nor has he offered any other evidence to suggest that he suffers from any medical condition that the trial court might possibly have viewed as mitigation so substantial as to offset Hyser's considerable criminal history. Absent any showing that some evidence exists to indicate that Hyser was prejudiced by Raff's conduct at the

sentencing hearing, the State's assertion that the post-conviction court's grant of relief on this issue was clearly erroneous is correct. Nothing in the record supports the post-conviction court's apparent determination that the prejudice prong of *Strickland* was satisfied. The post-conviction court's grant of relief is therefore reversed.

II. Defendant's Cross-Appeal: Ineffective Assistance of Counsel at Trial

On cross-appeal, Hyser claims that the post-conviction court erred when it determined that he was not entitled to relief on his claims that his counsel was ineffective as a result of Raff's alleged lack of preparation for trial and of the animosity between Raff and Hyser. However, Hyser fails to meet the requirements of *Strickland's* prejudice prong.

Hyser does not present any evidence suggesting that a different performance on the part of his trial counsel might have resulted in a different verdict at trial. He does not challenge the State's assertion—supported by the trial record—that Raff argued his case at trial and effectively cross-examined the State's witnesses. Hyser contends that Raff was deficient because he failed to strike any jurors, take any depositions, or call any witnesses, but Hyser himself does not suggest that any particular juror should have been removed or that there are any witnesses who could have helped his case. He argues that Raff was ineffective because he failed to offer any specific jury instructions at trial, but he does not suggest any particular instruction that might have swayed the jury. Absent some clear showing by Hyser that Raff's performance, had it been different, might have changed the result of Hyser's trial, we cannot say that the trial court erred in denying relief on this ground.

Furthermore, Hyser's insistence that his acrimonious relationship with Raff resulted in Raff's allegedly ineffective counsel and that this led to Hyser's conviction is insufficient by itself to prove prejudice. While we recognize that the attorney-client relationship here was strained, this resulted from Hyser's own belligerence and aggressiveness toward Raff. Raff persuaded the trial court that he had, indeed, communicated adequately with his client, and Hyser's complaints were based not on Raff's ineptitude or neglect but on Hyser's frustration with Raff's responses when they did not comply with what Hyser wanted to hear from his attorney. Moreover, to grant Hyser relief based on the breakdown of this attorney-client relationship would create an avenue by which any defendant could gain a right to relief by acting with outright hostility toward his counsel and the court. And again, Hyser fails to indicate in any manner how the outcome of his trial might have differed had he and Raff communicated differently. Absent this showing of prejudice, Hyser does not meet his burden to show that he was entitled to relief. As to both of Hyser's related claims on cross-appeal, then, we must affirm.

We therefore reverse the post-conviction court's grant of relief to Hyser on his claims regarding Raff's performance at sentencing. We affirm the post-conviction court's determination, however, that Hyser failed to demonstrate prejudice on his claims that his attorney was ineffective at trial because he allegedly failed to properly prepare for or argue Hyser's case and because of the discordant nature of the attorney-client relationship.

Affirmed in part, reversed in part.

DARDEN, J., and RILEY, J., concur.